Office - Supreme Court, U.S.
FILED
NOV 23 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-685

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES S. CONLEY,

Petitioner,

versus

CITY OF MONTGOMERY, ALABAMA
A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD C. BELSER
PHILIP H. BUTLER

OF COUNSEL:

Attorneys for Respondent

ROBISON & BELSER, P.A.
P. O. Drawer 1470
Montgomery, Alabama 36102
(205) 834-7000

TABLE OF CONTENTS

	Page
Questions Presented for Review	1
Statement of the Case	2
Statement of the Facts	4
Reasons for Denying the Writ	6
Conclusion	12
Certificate of Service	13

TABLE OF AUTHORITIES

Page

Cases:

City of Prichard v. Moulton, 277 Ala. 231, 168 So.2d 602 (1964) 9

Cooper v. Green, Ala. 359 So.2d 377 (1978) 7

New York, ex rel. Bryant v. Zimmerman, 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61, 62 A.L.R. 785 (1928) 8

Oxley Stave Co. v. Butler County, 166 U.S. 648, 41 L.Ed. 1149, 17 S.Ct. 709 (1897) 8

Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 395-396, 101 S.Ct. 1889 (1981) 8, 9

Statutes:

Alabama Rules of Civil Procedure, Rule 8(c) 9

United States Code, Title 28, Rule 19 1.(a) 6

NO. 82-685

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CHARLES S. CONLEY,

Petitioner,

vs.

CITY OF MONTGOMERY,
ALABAMA, A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

I

Whether the Petitioner properly and adequately presented federal constitutional issues for the trial Court to rule upon?

II

Does the record of the subject in rem proceeding to abate public nuisance reveal deprivation of the Petitioner's federally protected rights?

STATEMENT OF THE CASE

The litigation which is the subject of this Petition for Writ of Certiorari is comprised of actions filed in the Circuit Court of Montgomery County, Alabama, in rem, by the City of Montgomery, Alabama, a Municipal Corporation, against 19 duplex housing units, all located within the City Limits of Montgomery. These causes of action were originally filed separately against each duplex but were later consolidated for trial upon motion of the petitioner-property owner without objection of the City of Montgomery

A Motion to Dismiss these actions was filed by the petitioner-property owner, which was subsequently overruled. The petitioner-property owner then filed an Answer denying that the subject units constituted public nuisance and denying the allegations of the complaints in rem. Neither the Motion to Dismiss nor the Answer filed by the petitioner-property owner raised Federal Constitutional claims.

Trial of the subject actions were set in the Fifteenth Judicial Circuit of Alabama, and Appellant filed a Motion for Continuance of trial, which was denied. Upon such denial, the Appellant petitioned for certiorari before the Alabama Supreme Court seeking an Order directing the Trial Court to grant the continuance. The Petition for Certiorari was denied by the Alabama Supreme Court.

Trial was held on the merits of these consolidated actions with the Court sitting non-jury. Evidence was received ore tenus and after receipt of such evidence, the Trial Court issued its Order finding that each of

the subject duplexes were public nuisances and that each were in violation of the minimum housing code requirements of the City of Montgomery, Alabama.

The Trial Court thereupon ordered the Appellant to bring his property within compliance of the minimum housing code requirements of the City of Montgomery, Alabama, and set timetables to accomplish the same.

The petitioner-property owner appealed the Order of the Trial Court and the Order was subsequently affirmed by the Alabama Supreme Court on the 23rd day of April, 1982. Application for Rehearing was timely filed and was denied by the Alabama Supreme Court.

From the overruling of the Application for Rehearing, the petitioner-property owner filed this Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

The City of Montgomery, Alabama, after receiving numerous complaints concerning the subject properties from tenants, neighbors and City Councilmen, initiated efforts to remedy public nuisance conditions created by the subject properties (R. 214). These efforts initially involved contacting the owner of the property by letter informing the owner of specific defects and areas wherein the structures did not comply with the uniform minimum housing code of the City. After receipt of these letters, the owner at such time, William Compton, made certain repairs in accord with an agreement for repairs with the Enforcement Division of the Housing Code Department (R. 312).

The subject units were purchased by the Appellant on March 31, 1977 (R. 506). At the time of the sale to the Appellant, the seller advised the Appellant that some of the duplex units were under an agreement with the City of Montgomery to be brought up to minimum housing code standards (R. 373). The seller gave the Appellant a list of the units which did not comply with the uniform minimum housing code standards as of the date of the sale (R. 386). The Housing Code Department of the City contacted the Appellant subsequent to his purchase of the subject units and requested that the Appellant bring the units into compliance with the uniform minimum housing code standards. The Appellant advised the Director of the Housing Code Enforcement Division that he was not going to repair the duplexes (R. 258).

Having failed to persuade the Appellant to bring

the 19 duplexes up to minimum housing code standards, the City filed an action in the Circuit Court of Montgomery County as to each of the units seeking to enforce its uniform minimum housing code standards and to have the subject units declared public nuisances.

At trial of these consolidated cases, the Director of the Enforcement Division of the Housing Code Department testified that all of the 19 duplex units were unfit for human habitation (R. 231) and, further, that none of the units were in compliance with the uniform minimum housing code standards of the City of Montgomery (R. 317, 321, 322, 324, 326, 328, 329, 331, 332, 334, 337, 338-39, 341, 343, 344-45, 349, 350 and 352). The areas in which the units did not comply with the uniform minimum housing code standards were specifically provided to the Appellant nearly two years before these actions were filed (R. 192-193). Photographs were introduced into evidence as Plaintiff's Exhibits (1, 2, 3, 4, 7, 8, 10, 11, 13, 14, 16, 17, 19, 21, 23, 25, 27, 29, 37, 38, 40, 41, 43, 44, 46, 47 and 49) which demonstrated the condition of the subject duplex units.

At the close of all of the evidence, the Trial Court found that the City of Montgomery was entitled to enforce its uniform minimum housing code standards as to the 19 subject duplexes and found that each of said units were a public nuisance. The Court established a timetable which allowed the Appellant the alternative of systematic compliance with the uniform minimum housing code within reasonable periods of time or suffer the units to be razed.

REASONS FOR DENYING THE WRIT

I

THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO REVIEW BY WRIT OF CERTIORARI IN THAT NO FEDERAL CONSTITUTIONAL QUESTION WAS PRESENTED OR DECIDED BELOW.

Petitioner apparently bases his request for Writ of Certiorari upon Rule 19 1. (a) of Supreme Court Rules:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The record of the trial of this cause fails to reveal any instance of Petitioner even attempting to litigate Federal Constitutional issues. The only reference to the United States Constitution or Amendments thereto are those broad statements of Petitioner quoted on Pages 11-12 of his Brief in support of this Petition.

It is obvious, even without review of the record, that these "statements" by Petitioner were simply argument in support of his Motions for Continuance and to Dismiss. At no point in the proceeding did the Petitioner in his pleadings attempt to bring Federal Constitutional issues before the Trial Court. Neither were there objections raised by the Petitioner in an attempt to preserve any Federal Constitutional issues.

The Alabama Supreme Court in affirming the Order of the Trial Court noted that the Defendant, on appeal, raised issues claiming Constitutional questions but correctly found that the record failed to show issues were presented to the Court below. Therefore, because of the Defendant failing to litigate the issue at trial, he could not litigate such issues for the first time on appeal. *Cooper v. Green,* Ala. 359 So.2d 377 (1978).

In 1973, the State of Alabama adopted (with few exceptions) the Federal Rules of Civil Procedure providing for notice pleading and for liberal allowance of Amendments to pleadings. However, the pleadings in the instant case are totally void of any reference to Federal Constitutional issues and are equally void as to any attempt to include such issues by Amendment. Petitioner never claimed in his pleadings that his Federal Constitutional rights were being infringed upon by the City of Montgomery, Alabama, in its attempt to enforce its uniform minimum standard housing code against his rental duplexes.

Respondent submits that Petitioner's broad accusation of some obscure conspiracy and his oral satement to the Trial Court that in his "opinion" the City

violated Federal and State Constitutional rights, without more, is insufficient to present a Federal claim upon which the Trial Court could be expected to rule. As previously mentioned, these statements by the Petitioner were by way of argument in support of his Motions for Continuance and to Dismiss and certainly did not give the City of Montgomery fair and reasonable notice that it was called upon to defend Federal Constitutional claims.

In addressing jurisdiction by certiorari to review a State civil case, this Court in *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392, 395-396, 101 S.Ct. 1889 (1981) held:

> ". . . It has become clear, however, that the federal question was not raised below and that we are without jurisdiction in this case. We must, therefore, dismiss without reaching the merits."

It is well-established that the jurisdiction of the United State Supreme Court to reexamine a final judgment of a State Court can only exist if the federal claim was adequately presented in the State Trial Court. *New York, ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61, 62 A.L.R. 785 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 41 L.Ed. 1149, 17 S.Ct. 709 (1897).

The instant consolidated actions were filed by the City of Montgomery, Alabama, a Municipal Corporation, in rem, to enforce its minimum standard housing code against certain duplex structures which happened to be owned by the Petitioner. If Petitioner claimed

that the City of Montgomery could not enforce its housing code against his properties due to alleged Federal Constitutional violations, then clearly such defense would be required to be pled in his Answer. *City of Prichard v. Moulton,* 277 Ala. 231, 168 So.2d 602 (1964). Such defense against enforcement would be by way of confession and avoidance and clearly such special defense would have to be pled in order to give the plaintiff notice of the special defense. ARCP 8(c).

Nevertheless, the Petitioner now complains that the Supreme Court of Alabama committed error by failing to rule upon his "Federal Constitutional Claim". In *Webb v. Webb,* supra, this Court stated:

> ". . . This Court has frequently stated that when 'the highest State Court has failed to pass upon a Federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party in this Court can affirmatively show to the contrary. *Street v. New York,* 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969) . . ." 68 L.Ed.2d, at 396."

Not only is the Petitioner unable to affirmatively show wrongful omission on the part of the Alabama Supreme Court to pass upon the Federal claim but rather the opinion of the Alabama Supreme Court clearly states that it could not review the Federal Constitutional claims because they were not properly presented at trial.

II

THE FEDERAL CONSTITUTIONAL CLAIMS NOW RAISED BY THE PETITIONER ARE WITHOUT MERIT.

The record at trial of this cause clearly shows that the Petitioner's belated Federal Constitutional claims are totally without merit. Petitioner maintains that the City of Montgomery, Alabama, took a substantially different attitude toward the subject properties after he purchased them. However, the record clearly shows that the previous owners of the property had cooperated substantially more with the Housing Code Department of the City of Montgomery than did the Petitioner in working toward compliance with the minimum standard housing code. (R. 312, 316).

The above claim by the Petitioner was specifically addressed by the Alabama Supreme Court as follows:

> "Defendant claims that the Order of the Trial Court reveals bias and prejudice against him by imposing an unreasonable timetable for the making of repairs as a condition to avoiding the destruction of his property. We respectfully disagree. The record discloses that the defendant was aware, at the time he purchased the duplex units, that many of them did not comply with the minimum housing code requirements. Furthermore, defendant did not offer alternative time schedules for making the repairs. We held in *National Southern Products Corp. v. City of Tuscaloosa,* 246 Ala. 316, 20 So.2d 329,

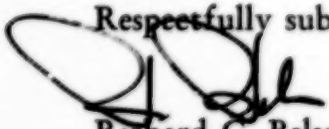
> (1944), that the burden rests upon the property owner to bring forward matters showing that the abatement of the public nuisance could be accomplished by less drastic means than requested by the municipality. Defendant here did not meet that burden." 16 A.B.R. 1495; p. A-21, Petitioner's Brief in Support of Certiorari.

Petitioner's reference on Page 15 of his Brief in Support of Certiorari attempts to interject a novel and unrelated issue on whether he was given proper notice concerning weed cutting on his subject properties. The record will show that references to high weeds were properly objected to at trial by the Petitioner and the Trial Court sustained the objection. The subject action did not involve existence of weeds but rather involved the enforcement of the City's minimum housing code standards against the duplex structures and the abatement of public nuisance existing due to such non-compliance. The reference to lack of notice about weed cutting had nothing to do with the subject case at trial and clearly has nothing to do with the appeal or this Petition for Writ of Certiorari.

CONCLUSION

Due to the above and foregoing reasons, the Petition for Writ of Certiorari in the instant case is due to be denied.

Respectfully submitted,



Richard C. Belser

Philip H. Butler

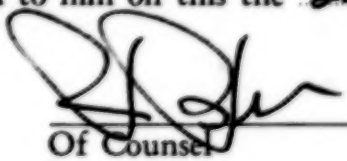
Attorneys for Respondent

OF COUNSEL:

ROBISON & BELSER, P.A.
P. O. Drawer 1470
Montgomery, AL 36102
(205) 834-7000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of the foregoing Brief in Opposition to Writ of Certiorari upon Charles S. Conley, Esquire, Petitioner and Attorney for Petitioner, 315 S. Bainbridge Street, Montgomery, Alabama 36104 by depositing same in the United States mail, first-class postage prepaid and properly addressed to him on this the 22nd day of November, 1982.



Of Counsel